One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. International Union United Automobile Workers of Am.*, 352 U.S. 567, 575 (1957).

Additionally, reforms—and expenditure limits in particular—can be justified by a compelling content-neutral interest in preserving the quality of representation by eliminating the enormous burden of raising enormous campaign war chests. That this burden exists, and has come to dominate the professional lives of officeholders and candidates is not open to serious question. *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281 (1994). As *amici* can attest, the incessant demands of fund-raising substantially impairs elected representatives in fulfilling their professional duties. Elected officials spend so much time raising campaign funds that they do not have enough time remaining to master issues, communicate with constituents and perform other essential parts of their jobs. This interest is not merely important: it is of a constitutional dimension in its own right.

This problem is the direct result of the absence of limits on campaign spending. Moreover, the fundraising burden on

candidates is a direct outgrowth of *Buckley*. By upholding limitations on contributions while striking down spending limits, *Buckley* established a legal structure that has proven untenable. If legislators address the risk of corruption by imposing contribution limitations, they force officeholders and candidates to spend most of their time raising campaign funds. If they decide to free officeholders and candidates from this burden by eliminating contribution limits, they must endure the risk of actual and perceived corruption of the electoral process.

These justifications for reform address public concerns wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure, but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community").

3. More generally, the Court also should apply a deferential standard of proof that will allow vindication of legislative judgments of the necessity of campaign finance

laws. In First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). That wisdom applies with particular force in the present context. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); *see also Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 548.

This deference has been applied to laws regulating the electoral process even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986); alteration in original). There, the Court affirmed a campaign reform, even in the fact of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is warranted in part because "it is difficult to isolate the exact effect" of campaign finance laws on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance laws, the justification for regulation is declining public faith in the electoral system—a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to access. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Court therefore has provided deference to permit legislatures "to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem [was] not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never be reliably ascertained*."

Id. (emphasis added). Finally, *Buckley* admonished courts to avoid "fine tuning" of legislative limits on contributions. *Id.* at 30.

The Court has reiterated this deferential portion of *Buckley* in subsequent cases. *See FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference"); *id.* (Court will not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was "an appropriate means by which Congress could seek" to advance governmental interest). The Court made the same point in *Shrink Missouri*. Noting that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised," the Court held it was "neither novel nor implausible" that large contributions present dangers of corruption and arouse voters' suspicions in the integrity of the system. *Shrink Missouri*, 528 U.S. at 391. The Court therefore sustained the contribution limits without demanding much evidentiary proof, concluding "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 395.[4]

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[4] The Court in *Shrink Missouri* relied upon an affidavit from a State Senator to the effect that large contributions have "the real potential to buy votes," newspaper accounts of potential improprieties related to large campaign contributions, several campaign financing scandals cited by the Court of Appeals in another case, and a voter referendum reflecting support for contribution limits. *Id.* at 394-95.

This deference is appropriate, and should be afforded here. Legislatures, not courts, are institutionally better suited to assess the need for campaign finance laws and what types of laws will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican I*, "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting). "Where a legislature has significantly greater institutional expertise, as for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Missouri*, 528 U.S. at 402 (Breyer, J., concurring). The Court must allow vindication of the predictive judgments of legislatures that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

The first-hand experience of *amici* indicates that the campaign laws upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. And the regime *Buckley* put in place has had the perverse consequence of burdening officeholders and candidates with the ceaseless task of fundraising to ensure adequate war chests—a burden that is eroding the quality of representative government in this country even as it erodes the public's faith in their elected officials. At the same time, the Court should not overestimate the impact that campaign finance laws have on First Amendment interests on the other side of the balance.

Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures—which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials—will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican I*, 518 U.S. at 649-50 (Stevens, J., dissenting).

CONCLUSION

This Court should grant review of the question whether Vermont's campaign expenditure limitations violate the First Amendment.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Counsel of Record
JENNER & BLOCK LLP
601 Thirteenth Street NW
Washington, DC 20005
(202) 639-6000

June 15, 2005

Counsel for *Amici Curiae*

Nos. 04-1528 and 04-1530

Supreme Court, U.S.
JUN 15 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEIL RANDALL, et al.,

Petitioners,

v.

WILLIAM SORRELL, et al.,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, et al.,

Petitioners,

v.

WILLIAM H. SORRELL, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF NEW HAMPSHIRE, OREGON AND WISCONSIN IN SUPPORT OF GRANTING THE PETITIONS WITH REGARD TO THE FIRST QUESTION PRESENTED

RICHARD E. SCHWARTZ
DANIEL T. BROWN
Counsel of Record
HEATHER MAJOR
Of Counsel
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

June 15, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI*

Amici include the following Secretaries of State: William M. Gardner, Secretary of State of New Hampshire, Bill Bradbury, Secretary of State of Oregon, and Douglas La Follette, Secretary of State of Wisconsin.[1] *Amici* serve as the chief elections officers of their states, which gives them extensive experience with the issues raised in this case.

Amici seek review of the Second Circuit's decision because, although they believe that it is supported by this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), it is contrary to similar decisions of the Sixth and Tenth Circuits. As the chief elections officers in their states, they are particularly concerned about the impact that the split in the Circuits' decision will have on the ability of States and localities to enact effective reform measures sought by their citizens and legislators. Moreover, *Amici* are concerned about the detrimental impact that the split among the Second, Sixth and Tenth Circuits will have on their efforts to enact innovative campaign finance laws. As discussed further below, the present uncertainty regarding mandatory spending limits has a chilling effect on the creativity of the State and local governments which should be serving as laboratories of democracy.

If the Sixth and Tenth Circuits correctly interpreted *Buckley* as imposing a *per se* ban on mandatory campaign spending limits, *Amici* urge this Court to reconsider its holding in *Buckley* and permit Vermont to demonstrate

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *Amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

that its campaign expenditure limits satisfy constitutional requirements. If such a *per se* ban truly exists as a result of *Buckley* that ban will stifle the creativity of States and localities in this arena. As the Respondents demonstrate, the circumstances that led this Court to enact that barrier 29 years ago have changed. This Court should reconsider the extent of First Amendment limits on campaign expenditure laws.[2]

STATEMENT OF THE CASE

This case involves amendments to its campaign finance laws enacted by the State of Vermont in 1997. These amendments were adopted with the overwhelming approval of bipartisan majorities of both houses of the Vermont Legislature. *See Landell v. Sorrell*, 382 F.3d 91, 100 (2d Cir. 2004). The amendments have succeeded in "preventing the reality and appearance of corruption, and protecting the time of candidates and elected officials." *Id.* at 124. As the *Landell* District Court found, and the Second Circuit agreed, limits on campaign contributions alone have been ineffective in achieving those goals in federal elections. *Id.* at 116-125. The Second Circuit summarized additional ills attributable to the lack of spending limits in our current system of campaign finance. *See id.* at 115.

A split among the circuits exists on this important issue. The Second Circuit, in this case, held that *Buckley* does not erect a campaign spending limits barrier while the Sixth and Tenth Circuits have held that such a barrier

[2] *Amici* also support the conditional cross-petitions of both William H. Sorrell, et al., the Respondent-Conditional Cross Petitioner and Vermont Public Interest Research Group, et al., Respondent-Intervenors-Conditional Cross Petitioners.

exists. *See* Randall Petition for Certiorari at 22; Vermont Republican State Committee ("VRSC") Petition for Certiorari at 5-7. The importance of this issue is demonstrated by studies that show the current degree of cynicism among the population and diminishing voter turnout. Regardless of the actual scope of *Buckley's* holding, *Amici* urge this Court to grant the Petition and remove the cloud over the constitutionality of campaign spending limits.

REASONS FOR PARTIALLY GRANTING THE PETITIONS

Amici urge granting the petitions with regard to the first question presented for three reasons. The first is the strong citizen desire for reform. That desire has expressed itself in numerous reform efforts. While some State and local legislative bodies have interpreted *Buckley* to allow mandatory campaign spending limits, the available data show that many have not enacted such limits because they believe that *Buckley* bars them. Second, this Court has recognized the benefit of allowing state legislatures – as the laboratories of democracy – to function as unfettered by judicial constraints as reasonably possible. Third, whether or not *Buckley* is correctly read to impose a *per se* barrier, declaring now that no such barrier exists will enable States and localities to address the problem more effectively because more minds will come to bear on the issue.

1. There is a strong desire for reform and experimentation in State and local governments. The results are simple expressions of disappointment with the high cost of campaigns and the perception of corruption that flows from the realities of fund raising. This appetite becomes

apparent with attempts to enact campaign spending limitations at the federal, State and local levels.

a. Politicians consider the fund-raising process debilitating because it takes away time that could be spent more valuably by serving their constituents. Politicians and commentators alike believe that too much valuable time is devoted to this ceaseless endeavor to raise funds.[3] This problem presents itself at the federal and local levels. At the state level, one study has shown that a majority of candidates for statewide office spend at least one-quarter of their time fund raising for their campaigns; nearly one-third of candidates for state legislative office are similarly preoccupied with fund raising.[4]

In addition, numerous Congressmen have recounted their fund raising experiences. For example, one Republican Senator (unnamed) admitted, "I knew Congress well before I came here, but I did not know the amount of time consumed by fundraising and how that encroaches on your

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[3] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUMBIA L. REV. 1281 (1994) (stating that candidates spend too much time fund raising) [hereinafter Blasi, *Free Speech*] *citing*, DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 79, 203-04 (1992); FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 72-73, (1992); BROOKS JACKSON, HONEST GRAFT: BIG MONEY and THE AMERICAN POLITICAL PROCESS 69, 91-92, 108 (1990); DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 43-45, 197 (1990); BURDETT LOOMIS, THE NEW AMERICAN POLITICIAN: AMBITION, ENTREPRENEURSHIP, AND THE CHANGING FACE OF POLITICAL LIFE 195-96 (1988); ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 96 (1983). *Id.* at 1281 n.1.

[4] Paul S. Herrnson and Ronald A. Faucheaux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), *at* http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

ability to work here. It devours one's time – you spend the two or three years before your re-election fundraising. The other years, you're helping others."[5] Likewise, former House Majority leader Richard Gephardt has also explained that "[i]f you have the need to raise three or four hundred thousand dollars, you're taking an enormous amount of the member's time just to raise money."[6]

The costs of elections at both the Federal and State levels have continued to skyrocket. This trend of rising costs, while evident to the *Buckley* Court in 1976, has continued to increase in the ensuing 29 years. The need for politicians to spend huge sums to win elections raises the perception of, and conditions for, corruption. Campaign funds often come from special interest groups with legislative agendas. When politicians win elections with these funds and then continue to receive financial backing from these same special interest groups, these politicians are likely to feel pressure to cater to these groups. *See Landell*, 382 F.3d at 117-118. Perhaps that is why the phrase "special interest politics" has become so commonplace in our national political discourse.

Similar to the problem with "special interest politics," a select few wealthy individuals and groups contribute the majority of campaign finances and thus possess a concentration of the political power. At least one commentator has posited that this power concentration creates a form of

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[5] PETER LINDSTROM, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988).

[6] Elizabeth Drew, Politics and Money: The New Road to Corruption 51 (1983).

vote dilution and is "incompatible with the Constitution's command of equality."[7]

Politicians routinely confirm that this problem is real. For example, former Rep. Dan Glickman (D-Kan.) admits that "[m]oney has made it more difficult for Democrats to define an economic agenda that is different from the Republican agenda; we are taking from the same contributors."[8] These very reasons are why Congress periodically considers solutions to free candidates from excessive fundraising obligations.[9]

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[7] Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 Minn. J. of Law & Inequality 239, 244-45 (2005).

[8] Ken Hechier, *Financing Elections: West Virginia, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990), *available at* http://www.polsci.wvu.edu/ipa/par/report_7_3.html [hereinafter Hechier, *Financing Elections*]. *See also, Free Speech and Campaign Finance Reform: Subcommittee Hearing on the Constitution Before the House Comm. on the Judiciary, 105th Cong. Sess.* 1 (1997) (attaching statement of Gene Karpinski, Executive Director of U.S. Public Interest Research Group stating "with this kind of influence accorded to big money in our political system, the candidates and the political parties will increasingly look alike on all issues of importance to moneyed interests"), *available at* http://www.house.gov.judiciary/22226.htm [hereinafter Karpinski, *Free Speech and Campaign Finance Reform*].

[9] In 1993, Members of the House of Representatives frequently commented on it. *See, e.g.*, 139 CONG. REC. H10656 (daily ed. Nov. 22, 1993) (remarks of Rep. Gejdenson); *id.* at H10665 (remarks of Rep. Harman); *id.* at H10670 (remarks of Rep. Reed); *id.* at H10671 (remarks of Rep. Hughes); *id.* at H10672 (remarks of Rep. Beilenson); *id.* at H10675 (remarks of Rep. Woolsey); Beth Donovan, *House Takes First Big Step in Overhauling System*, 51 CONG. Q. WKLY. REP. 3246, 3248 (1993); Beth Donovan, *House Will Vote on Limits Nearly $1 Million in '96*, 51 CONG. Q. WKLY. REP. 3091 (1993). *See also*, Marcus & Babcock, *One Day in the Fundraising Trail: Dawn to Dusk/Chasing the Dollars*, THE BOSTON GLOBE, May 16, 1997 at A1, *quoting* U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political

(Continued on following page)

b. To address this need, which is felt at the State and local levels as much as at the federal level, various State and local governments have enacted – or considered but declined to enact – campaign spending limits. Since this Court's ruling in *Buckley* in 1976, however, legislatures and legal scholars have often understood the first Amendment as prohibiting *per se* mandatory campaign spending limits regulation.[10] In January 1997, Senator Arlen Specter (of Pennsylvania) commented that fundamental campaign finance reform remained impossible without overturning *Buckley*.[11] In advocating for campaign finance reform, he further stated, "[m]y concept of running for elective office . . . is a matter of issues, a matter of tenacity, a matter of integrity and how you conduct a campaign."[12]

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system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics."

[10] Indeed, in "Congressional deliberations, opposition to campaign spending limits has most often been expressed in terms of constitutional concerns." *See* Blasi, *Free Speech*, *supra* note 2, at 1288, *citing*, Beth Donovan, *Constitutional Doubts Bedevil Hasty Campaign Finance Bill*, 51 CONG. Q. WKLY. REP. 2215, 2217 (1993); Beth Donavan, *Finance by Gutting Public Funding*, 51 CONG. Q. WKLY. REP. 1534, 1539 (1993); Beth Donavan, *Constitutional Issues Frame Constitutional Options*, 51 CONG. Q. WKLY. REP. 437 (1993).

[11] Senator Specter also noted in his remarks on the floor of the Senate that a growing group of prominent legal scholars have called for the reversal of *Buckley*. 143 CONG. REC. S557-01, S558 (daily ed. Jan. 21, 1997) (statement of Sen. Specter). *See also* Karpinski, *Free Speech and Campaign Finance Reform*, *supra* note 7.

[12] 143 Cong. Rec. at S558, *supra* note 10.; *see also*, John C. Bonifaz, Brenda Wright, and Gregory Luke, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 41 (1999) ("Members of Congress have introduced 11 bills since 1976 which would establish campaign spending limits for federal elections.") Further, the note cites the following examples: S. 1684, 98th Cong. (1st Sess. 1983); S. 1185, 98th Cong. (1st Sess. 1983); S. 59, 99th Cong. (1st Sess. 1985); H.R. 2473,

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